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Constitutional Law - First Amendment - The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings

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CONSTITUTIONAL LAW—FIRST AMENDMENT—THE PUBLIC AND PRESS HAVE A RIGHT OF ACCESS TO CRIMINAL TRIALS ABSENT AN OVERRIDING INTEREST ARTICULATED IN FINDINGS.

Richmond Newspapers, Inc. v. Virginia (U.S. 1980)

John Paul Stevenson was convicted of second-degree murder in connection with the 1975 stabbing death of a Virginia hotel manager.[1] The Supreme Court of Virginia reversed this conviction on the ground that certain evidence had been improperly admitted.[2] During a subsequent retrial,[3] defense counsel moved that the trial be closed to the public and press in order to preserve the defendant's right to a fair trial by preventing information concerning testimony from reaching prospective witnesses.[4] The prosecutor made no objection[5] and the judge ordered the courtroom cleared.[6] Among those expelled were Wheeler and McCarthy, two reporters for Richmond Newspapers, Inc.[7] A motion to vacate the closure order was filed by Richmond Newspapers, Inc. and

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1. *See* Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2818-19 (1980).

2. Stevenson v. Commonwealth, 218 Va. 462, 237 S.E.2d 779, 782 (1977). The prosecution introduced expert testimony that blood on a shirt purportedly belonging to the defendant was of the same type as that of the deceased and alleged that Stevenson had worn the shirt at the time he committed the murder. *Id.* at 464, 237 S.E.2d at 781. Police had obtained possession of the shirt from the defendant's wife after asking her what her husband had been wearing when he returned home on the morning following the murder. *Id.* at 465-66, 237 S.E.2d at 781. Mrs. Stevenson did not testify at the trial but the police officer who had obtained the shirt from her testified as to her act of leading him to the shirt. *Id.* at 465, 237 S.E.2d at 781. The Court held that the officer's testimony relating to the shirt was inadmissible hearsay and concluded, therefore, that the introduction into evidence of both the shirt and the results of the scientific tests conducted thereon were without proper foundation. *Id.* at 466, 237 S.E.2d at 782.

3. 100 S. Ct. at 2818. Two previous attempts to retry Stevenson had resulted in mistrials. *Id.*

4. *Id.* at 2819.

5. *Id.*

6. *Id.* Witnesses were admitted to the courtroom only while on the stand testifying. *Id.* When issuing his closure order, the trial judge apparently relied on VA. CODE § 19.2-266 (1975), which provides in pertinent part: "In the trial of all criminal cases, . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated." *Id. See* 100 S. Ct. at 2819.

7. 100 S. Ct. at 2818-19.

its two reporters.[8] Following a hearing on the motion,[9] the trial judge denied the request[10] and the closed trial resumed the next day.[11] Richmond Newspapers and the two reporters appealed the validity of the closure order to the Virginia Supreme Court[12] which upheld the closure. The United States Supreme Court granted appellants' petition for certiorari[13] and reversed, *holding* that the first and fourteenth amendments guarantee that, absent an overriding interest articulated in findings, the public and press have a right of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia,* 100 S. Ct. 2814 (1980).

Throughout its development, both in England and in the United States, the criminal trial has consistently been open to all who have chosen to attend.[14] Originally, freemen were compelled to attend the Anglo-Saxon forerunner of the modern trial.[15] When this requirement lapsed, English trials remained open to all who chose to attend.[16] This characteristic of openness was adopted by the American colonists,[17] and continued as normal practice throughout American history.[18] The

8. *Id.* at 2819. Counsel for the newspapers argued that, prior to closing the trial to the public, constitutional considerations required the judge to find that no other less drastic measures would protect the defendant's right to a fair trial. *Id.*

9. *Id.* Defense counsel expressed concern that inaccurate accounts of the trial would be published and then read by the jurors. *Id.* This concern differs from that expressed by defense counsel when the motion was originally made. *See id.;* note 4 and accompanying text *supra.*

10. 100 S. Ct. at 2819. The judge noted his concern about spectators in the courtroom constituting a distraction to the jurors. *Id.* The prosecution again offered no objection to the closure order. *Id.* Out of deference to the rights of the defendant, and in the absence of any perceived countervailing considerations, the judge denied the motion to vacate the closure order. *Id.*

11. *Id.* at 2820. Following presentation of the Commonwealth's evidence, the judge found the defendant not guilty. *Id.*

12. *Id.* Following conclusion of the trial, the trial court granted appellants' motion to intervene in the Stevenson case. *Id.*

13. 444 U.S. 897 (1979). Pursuant to 28 U.S.C. § 1257(3) (1976), certiorari was granted specifically "to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." 100 S. Ct. at 2821. Pursuant to 28 U.S.C. § 1257(2) (1976), the reporters and the newspapers had also filed a notice of appeal from the decision of the Virginia Supreme Court. 100 S. Ct. at 2820. The Court postponed consideration of the question of its jurisdiction over the appeal until the hearing of the case on its merits. *See* 444 U.S. 896 (1979). Such jurisdiction was subsequently found lacking, however, because the appellants had never explicitly challenged the constitutionality of VA. CODE § 19.2-266 (1975) in the Virginia courts. 100 S. Ct. at 2820 n.4.

14. *See* notes 15-18 & 70-71 and accompanying text *infra.*

15. *See* Gannett Co. v. De Pasquale, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring in part and dissenting in part).

16. *See id.* at 423 (Blackmun, J., concurring in part and dissenting in part).

17. *See id.* at 424-25 (Blackmun, J., concurring in part and dissenting in part).

18. *See id.* at 414 (Blackmun, J., concurring in part and dissenting in part).

openness of trials was implicitly recognized by the Supreme Court in *Bridges v. California* [19] and *Pennekamp v. Florida*,[20] and was explicitly recognized in *Craig v. Harney* [21] where the Court stated: "A trial is a public event. What transpires in the courtroom is public property." [22]

19. 314 U.S. 252 (1941). In *Bridges*, publishers of editorials calling for jail sentences, rather than probation, for convicted but as yet unsentenced union enforcers were held in contempt of court. *Id.* at 271-72. The Supreme Court observed that "the very word 'trial' connotes decisions on the evidence and arguments properly advanced in *open* court." *Id.* at 271 (emphasis added).

20. 328 U.S. 331 (1946). In *Pennekamp*, publishers of editorials and cartoons which, in the eyes of the county court judges, tended to hold the judges up for unfair ridicule and attacked their integrity, and commented on pending litigation, were held in contempt of court. *Id.* at 336-40. Justice Frankfurter, concurring, observed that "trials must be public and the public have a deep interest in trials." *Id.* at 361 (Frankfurter, J., concurring).

Openness of criminal trials was an underlying assumption in subsequent cases dealing with the circumstances in which a trial may be closed. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). Before and during Sheppard's sensationalized murder trial, the jury was exposed to biased, inaccurate, and pervasive press coverage. *Id.* at 339-49. This was held to be a violation of the defendant's due process rights. *Id.* at 335. While reaching this conclusion, the right of the public and press to attend trials seemed to be an implicit premise for the Court's analysis. *Id.* at 350. The Court noted that the public examination of the criminal justice system facilitated by press coverage prevents the miscarriage of justice. *Id.* at 349-50. Noting an increase in unfair and prejudicial comment on pending litigation by the press, the Court nonetheless stated that "[t]here is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 362-63. When discussing the steps a trial judge may take to protect a defendant's due process rights, the Court's language indicates that a trial judge may limit and control the presence of the press, but not that he may eliminate that presence altogether. *See id.* at 358. *Accord*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 596 (1976) (Brennan, J., concurring in the judgment). For a discussion of *Nebraska Press, see* notes 29-33 and accompanying text *infra*.

See also In re Oliver, 333 U.S. 257 (1948). In *Oliver*, a Michigan circuit judge, sitting as a one-man grand jury, found the testimony of a witness to be unsatisfactory and immediately convicted and sentenced him to jail for contempt. *Id.* at 259. This procedure was held to violate the defendant's due process rights. *Id.* at 273. The Supreme Court stated:

> In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Id. The Court indicated that such secrecy was virtually unprecedented in Anglo-American history. *Id.* at 273.

The defendant's due process right to a public trial should be distinguished from his sixth amendment right to a public trial. *See* note 61 and accompanying text *infra*. Unlike the sixth amendment, which applies only to criminal prosecutions, the due process protection applies to all adjudications of guilt, such as contempt proceedings. Levine v. United States, 362 U.S. 610, 616 (1960).

21. 331 U.S. 367 (1947). In *Craig*, a county court judge held that the publishers of editorials urging him to grant a civil defendant's motion for a new trial were in contempt of court. *Id.* at 369-70. The Supreme Court held the findings of contempt to be in violation of the first amendment. *Id.* at 374.

22. *Id. See also* Estes v. Texas, 381 U.S. 532 (1965). The *Estes* Court held that a defendant's right to a fair trial was violated by the presence in the

Drawing upon the first amendment's guarantee of the freedom of the press to report on public events,[23] the Supreme Court has protected the right of the press to report on judicial proceedings.[24] This first amendment protection was relied upon in *Bridges*[25] and *Pennekamp*[26] where the Court afforded first amendment protection to published comments concerning pending litigation.[27] The Court noted that comments

courtroom, over the defendant's objections, of television cameras. *Id.* at 534-35. Dealing with the argument that the public's right to know justified the presence of television cameras the Court observed that "the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.* at 541-42. A concurring opinion noted that, despite the great usefulness of the medium of television, "television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them." *Id.* at 586 (Warren, C.J., concurring). *But see id.* at 588-89 (Harlan, J., concurring) (maintaining that television cameras are not entitled to presence in the courtroom since everyone's right to be there is severely limited; the right of "public trial" belongs to the accused and confers no rights on the public). For a discussion of the current status of the "cameras in the courtroom" controversy, *see* notes 54-57 and accompanying text *infra*.

Prior to 1979, only in dicta had the Court indicated that the public and press could be barred from a trial when their attendance would jeopardize the defendant's rights. Branzburg v. Hayes, 408 U.S. 665 (1972). The Court observed that reporters have the same right of access to any information as that held by the public generally, and that there are numerous sources which neither group may draw upon. *Id.* at 684. For example, the Court stated, "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." *Id.* at 684-85.

23. U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

The interpretation given to the first amendment is that it broadly protects rights of expression. New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). Justice Black stated that "the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.*

24. *See* notes 25-33 and accompanying text *infra*.

25. *See* note 19 and accompanying text *supra*.

26. *See* note 20 and accompanying text *supra*.

27. *See* Bridges v. California, 314 U.S. at 263. Speaking of the extent of the protection provided by the first amendment, the Court stated that the first amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id. See also* Pennekamp v. Florida, 328 U.S. at 347. Relying on *Bridges*, the *Pennekamp* Court stated that "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Id.*

The Court continued this theme in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where it restated the need for robust public discussion of the functioning of the courts, noted that the majority of the public would be

about judicial conduct will likely have their greatest impact while the case is pending and if discussion is restrained until the adjudication is concluded, it may by then be yesterday's news.[28] More recently, in *Nebraska Press Association v. Stuart*,[29] the Court indirectly reaffirmed, in a classic prior restraint context, the existence of first amendment protection for press reports of judicial proceedings.[30] Reviewing an order prohibiting publication of accounts of a pretrial proceeding which the press attended,[31] the Court held that any abridgement of first amendment rights would necessarily require consideration of other, less drastic, methods of protecting the defendant's rights,[32] possibly including the exclusion of the public from pretrial proceedings if the defendant consents.[33]

The related controversy over the corollary to the right to publish—an asserted first amendment right of access to information—was exam-

unable to gain this information firsthand, and observed that "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 492.

28. Bridges v. California, 314 U.S. at 268. Considering the potential effect of this type of contempt citation upon public discussion the Court stated:

> It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height.

Id. In *Pennekamp*, the Court observed that "[d]iscussion that follows the termination of a case may be inadequate to emphasize the danger to the public welfare of supposedly wrongful judicial conduct." 328 U.S. at 346 (footnote omitted). This reasoning applied as well in *Craig v. Harney*. *See* notes 21-22 and accompanying text *supra*.

29. 427 U.S. 539 (1976). In order to protect the defendant's sixth amendment right to trial by an impartial jury, the Nebraska Supreme Court had approved an order by the trial judge restraining publication or broadcast of certain information concerning the case, including accounts of confessions introduced in open court at the defendant's arraignment. *Id.* at 541-45. Several press and broadcast associations, publishers, and individual reporters petitioned for relief. *Id.* at 543.

30. *Id.* at 559-60.

31. *See* note 29 *supra*.

32. 427 U.S. at 563-64. The alternatives suggested by the Court included change of venue, postponement of the trial, searching questioning of prospective jurors, emphatic instruction on each juror's duty, and gag orders on attorneys, police, and witnesses. *Id.*

33. *Id.* at 564 n.8. The Court indicated that this measure was a possible alternative, without squarely stating that it would approve of such a practice. *Id.* The Court noted that closing the preliminary hearing would have prevented the press from hearing the defendant's confession, thereby eliminating the need for the objectionable prior restraint on publishing and broadcasting. *Id.* at 568. For further discussion of *Nebraska Press, see* Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608 (1975); Note, Nebraska Press Association v. Stuart: *Balancing Freedom of the Press Against the Right to a Fair Trial*, 12 NEW ENG. L. REV. 763 (1977).

ined by the Court in *Kliendienst v. Mandel*,[34] where an alien intellectual was refused entry into the United States.[35] An action challenging the exclusion was brought by the alien, and university professors who had hoped to meet with him, in which it was asserted that the public had a first amendment right of access to information which was sufficient to overcome the executive's authority to prohibit the entry.[36] Although the Court upheld the exclusion, it acknowledged the existence of the asserted right.[37] The strength of this first amendment right of access to ideas and opinions was made clear in *First National Bank v. Bellotti*.[38] The Court in that case endorsed a "functional model" of the first amendment,[39] stating that a component of that model protects the public's right to acquire information.[40]

34. 408 U.S. 753 (1972).

35. *Id.* at 756-59.

36. *Id.* at 762. For an extensive discussion of the asserted first amendment right of access, including an analysis of the impact of *Richmond Newspapers, see* O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1980).

37. 408 U.S. at 762. The Court observed that "[i]n a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas' . . . ." *Id.* This right was held to be subservient to the plenary power of Congress to control immigration, which it has delegated to the executive. *Id.* at 769-70.

38. 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute which prohibited banks and other corporations from making expenditures to influence the outcome of referendum elections other than one materially affecting any of the property, business or assets of the corporation. *Id.* at 767.

39. *Id.* at 776. The Court did not focus on the right of expression possessed by business organizations in finding the statute violative of the first amendment's functional purpose, noting that:

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

Id. The first amendment is intended to ensure free discussion of governmental affairs. *Id.* at 776-77. To accomplish this purpose, the first amendment protects not only the right to free expression, but also includes a "role in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted). A dissenting opinion acknowledged this role as well. *Id.* at 806 (White, J., dissenting). Justice White argued: "The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas." *Id.*

40. *Id.* at 783. Finding that the first amendment had a role to play in protecting public access to ideas, the Court stated that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.*

Justice Rehnquist dissented, finding that states may regulate the activities of corporations in ways not applicable to natural persons. *Id.* at 826-27 (Rehn-

In *Branzburg v. Hayes*[41] the Court acknowledged that the process of newsgathering was itself entitled to *some* measure of first amendment protection, although the scope of that protection was left unclear.[42] In *Pell v. Procunier*[43] and *Saxbe v. Washington Post Co.*,[44] decided together, the Court upheld prison regulations prohibiting reporters from interviewing individual inmates with whom they had specifically requested to meet.[45] While neither affirming nor denying an asserted right of access to sources of information, the Court indicated that, whatever the nature of that right, it had, in these cases, been satisfied.[46] However, in *Houchins v. KQED, Inc.*,[47] which involved a challenge by the press to access limitations imposed upon a county jail,[48] a plurality

quist, J., dissenting). Furthermore, Justice Rehnquist expressed the opinion that the first amendment has only a limited application to the states, and does not prohibit this type of regulation. *Id.* at 823.

41. 408 U.S. 665 (1972).

42. *Id.* at 667. The issue before the Court in *Branzburg* was whether forcing reporters to testify before state or federal grand juries concerning possible observations of criminal activity made while gathering news abridged first amendment rights. *Id.* The Court answered this question in the negative. *Id.* However, the Court stated that it did "not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for first amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. This case did not present the proper circumstance, in the Court's view, for extending such protection. *Id.* at 691-92.

43. 417 U.S. 817 (1974). The regulation challenged in this case was promulgated by the California Department of Corrections. *Id.* at 819.

44. 417 U.S. 843 (1974). The regulation challenged in this case was promulgated by the Federal Bureau of Prisons. *Id.* at 844.

45. Pell v. Procunier, 417 U.S. at 819; Saxbe v. Washington Post Co., 417 U.S. at 844.

46. Pell v. Procunier, 417 U.S. at 830-33. The Court found that the press had access to information about prison conditions through other avenues and that prison officials had substantial justification for prohibiting face-to-face interviews with inmates. *Id.* A dissenting opinion indicated that the public relied on the press for information concerning public institutions and that this regulation substantially interfered with the public's right to possess information concerning the conduct of the government. Saxbe v. Washington Post Co., 417 U.S. at 864 (Powell, J., dissenting).

Rejecting an argument that the press should be given greater access to information than the public at large, the Court held that the right of access for the press was coextensive with that possessed by the public. Pell v. Procunier, 417 U.S. at 833-35; Saxbe v. Washington Post Co., 417 U.S. at 850. Justice Powell's dissent in *Saxbe* agreed with this proposition. *Id.* at 857 (Powell, J., dissenting).

47. 438 U.S. 1 (1978).

48. *Id.* at 3. Monthly public tours of the jail were scheduled, but the tours were of limited size, did not include viewing of the most notorious sections of the facility, and neither inmate contact, recording, nor photography was permitted. *Id.* at 4-5. The Court framed the issue as whether the press had a right of access to the jail greater than that of the public. *Id.* at 3. The answer to that question was negative. *Id.* at 11. *See* note 46 and accompanying text *supra*.

of the Court found that neither the press nor the public had a constitutional right of access to information within the government's control.[49]

Against the right of the press to report on public events, courts must balance the accused's right to a fair trial.[50] The most notable recognition of the need to insulate the criminal justice system from the excesses of press coverage is found in the case of *Sheppard v. Maxwell*.[51] While acknowledging the important role which the press plays in the fair administration of justice, the *Sheppard* Court stated that trial judges have a duty to prevent publicity about a trial or investigation from infringing the rights of the accused.[52] The Court identified six procedures that could protect those rights from the adverse effects of publicity, including limiting the presence of the press in the courtroom.[53] Interference by the press in the trial process was also prohibited in *Estes v. Texas*.[54] In *Estes*, the Court found that the number, placement, and operation of both still and television cameras in the courtroom had had a disruptive and prejudicial effect on the defendant's trial warranting a reversal of his conviction.[55] Recently, however, the Court has made clear that the presence of cameras in the courtroom is not per se violative of a defendant's right to a fair trial[56] and that the states are free to allow cameras so long as their operation is carefully controlled and the rights of the defendant are otherwise protected.[57]

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49. 438 U.S. at 8-16. The Court made clear that it had never meant to indicate that there was an absolute right of access to information, concluding that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Id.* at 15. A dissenting opinion vigorously argued that the gathering of information required constitutional protection, stating that "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." *Id.* at 32 (Stevens, J., dissenting) (footnote omitted).

50. *See* notes 51-54 and accompanying text *infra*.

51. 384 U.S. 333 (1966).

52. 384 U.S. at 362-63.

53. *Id.* at 358. The other five suggested procedures for protecting the defendant's rights were change of venue, sequestration of the jury, insulating witnesses from other testimony and from the press, issuing gag orders upon trial participants, and granting a continuance until the publicity abates. 384 U.S. at 359-63.

54. 381 U.S. 532 (1965). For a discussion of *Estes*, *see* note 22 and accompanying text *supra*.

55. 381 U.S. at 534-35.

56. Chandler v. Florida, 49 U.S.L.W. 4141, 4145 (Jan. 26, 1981).

57. *Id.* at 4146-47. The Court noted:

> It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most, experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee

The foremost case on the subject of public access to criminal proceedings prior to *Richmond Newspapers* was *Gannett Co. v. De Pasquale*.[58] The publisher of area newspapers challenged an order, agreed to by both the defense counsel and the prosecutor, barring the public and press from a pretrial suppression hearing in a widely reported murder case.[59] The Court began its analysis by stating that trial judges have a duty to protect a defendant's sixth amendment right to a fair trial from the effect of prejudicial pretrial publicity.[60] Focusing upon the publisher's claim that the sixth amendment required that trials be public, the opinion indicated that this right belonged exclusively to the defendant.[61] Then, noting the value of public trials to the administration of justice,[62] the Court found it to be the duty of the prosecutor to protect these interests.[63] However, while observing that the common law tradition of open trials applies with equal force to civil and criminal trials, the Court deduced that it was not subsumed within the sixth amendment because that amendment's protections apply only to criminal cases.[64] This enabled the Court, which continued throughout its opinion to speak of "trials" rather than suppression hearings, to hold "that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[65] The Court

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> or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene. We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.

Id. at 4147. The Court further observed that the defendant retains the right to argue, and bears the burden to prove, that the presence of cameras was prejudicial:

> [A] defendant has the right on review to show that the media's coverage of his case—printed or broadcast—compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process.

Id.

58. 443 U.S. 368 (1979).

59. *Id.* at 375.

60. *Id.* at 378. This duty was enunciated in *Sheppard*. *See* notes 51-53 and accompanying text *supra*. The *Gannett* Court indicated that when acting to protect a defendant's rights, a judge has wide latitude: "[B]ecause of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." 443 U.S. at 378.

61. 443 U.S. at 379-80. Consistently speaking in terms of public trials, rather than suppression hearings, the Court made clear that the press and public enjoyed no right of access to criminal trials through the sixth amendment. *Id.*

62. *Id.* at 383.

63. *Id.* at 384 n.12. The Court indicated that the prosecutor would be responsible for serving possibly conflicting interests: the public desire for an open trial and the due process rights of the defendant. *Id.*

64. *Id.* at 386-87.

65. *Id.* at 391. *See* note 61 *supra*. Chief Justice Burger wrote a concurring opinion to emphasize that there is a distinction between an order closing a

avoided considering whether the first and fourteenth amendments protected a public right of access to pretrial proceedings. Conceding for the sake of argument that such a right exists, the Court found that, in this case, it had been fully satisfied.[66]

Against this background, the Court in *Richmond Newspapers* considered whether the first amendment prohibits closure of a criminal trial.[67] Writing a plurality opinion for the Court, Chief Justice Burger noted preliminarily that, even though Stevenson's trial had concluded, the case was not moot [68] and that the question of whether the Constitution guarantees such a public right of access was an issue which had never been decided by the Court.[69]

The Chief Justice then set forth a comprehensive account of the development of the criminal trial in England and America [70] demon-

pretrial hearing and an order closing a trial. 443 U.S. at 394 (Burger, C.J., concurring). Another concurring opinion stated that, since the sixth amendment right to a public trial is personal to the accused, both pretrial proceedings and trials may be closed upon the agreement of the parties, however trivial their reason. *Id.* at 404 (Rehnquist, J., concurring). Focusing exclusively on the sixth amendment, Justice Blackmun would have found a right of public access to pretrial suppression hearings. *Id.* at 406-48 (Blackmun, J., concurring in part and dissenting in part).

66. *Id.* at 392. The Court noted that at the issuance of the closure order no one objected to it, the judge balanced the competing rights of the defendant and the public, and the effect of the denial of access was only temporary, as a transcript was eventually made available. *Id.* at 392-93. The dissent did not reach the question of a first amendment right of access since it maintained that the right is present in the sixth amendment. *Id.* at 413 n.2 (Blackmun, J., concurring in part and dissenting in part). A concurring opinion would have held that, when a pretrial hearing is as significant to the course of the pending litigation as this one was, a first amendment right of public access exists. *Id.* at 397 (Powell, J., concurring). This right is limited, according to Justice Powell, by the defendant's right to a fair trial and the government's need to protect confidences. *Id.* at 398 (Powell, J., concurring). The trial judge is obligated to consider whether alternative means will protect these interests. *Id.* at 400 (Powell, J., concurring). On these facts, Justice Powell's conditions for closure were satisfied: the trial judge weighed the competing interests and, although he did not consider alternate means of protecting the defendant's rights, none were brought to his attention. *Id.* at 401-02 (Powell, J., concurring).

67. 100 S. Ct. at 2821. *See* note 13 *supra.*

68. 100 S. Ct. at 2820. The Court noted that, even though the trial which had precipitated the disputed order had concluded, "the underlying dispute is 'capable of repetition, yet evading review.'" *Id., quoting* Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

69. 100 S. Ct. at 2821. While a similar issue had been presented in *Gannett,* Chief Justice Burger distinguished the earlier case from *Richmond Newspapers* on two grounds: 1) *Gannett* considered closure of pretrial hearings, not trials. *Id.* (Chief Justice Burger had written a concurring opinion in *Gannett* to emphasize this point. *See* note 65 *supra.*) 2) While *Gannett* considered only sixth amendment arguments against closure, *Richmond Newspapers* presented first and fourteenth amendment arguments. 100 S. Ct. at 2821. *See* note 66 and accompanying text *supra.* Other justices distinguished *Gannett* in various ways. *See* notes 95 (Justice Stevens), 96 (Justice Brennan) & 107 (Justice Stewart) *infra.*

70. 100 S. Ct. at 2821-23. *See also* Gannett Co. v. De Pasquale, 443 U.S. at 419-33 (Blackmun, J., dissenting); notes 14-18 and accompanying text *supra.*

strating a tradition of trials open to the public.[71] The Chief Justice also identified the benefits flowing from this policy, explaining that public attendance assures that the proceedings will be fairly conducted,[72] will provide an outlet for the desire for vengeance that may smolder in a community after the commission of a crime,[73] and will instill in the community confidence that justice is done in its courts.[74]

The Court then observed that this combination of historic practice and salutory result creates a presumption that criminal trials are to be open [75] and noted that such a presumption is consistent with earlier cases in which the Court, without directly so holding, recognized a presumption of openness.[76] The Chief Justice also noted that the absence of an explicit first amendment enumeration of the public's right of access to criminal trials [77] did not bar the Court from finding that this presumption of openness is protected by the first amendment's guarantees of freedom of speech and of the press.[78] Endorsing a functional model

71. 100 S. Ct. at 2821. The Chief Justice began his review of the development of the criminal trial by noting that "[w]hat is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe." *Id.* The tradition of openness dates from the period before the Norman Conquest, when attendance by freemen was compulsory. *Id.* When attendance was no longer required it became an option. *Id.* at 2822. This option was noted by contemporary legal commentators throughout English history. *Id.* The quality of openness was embraced by the American colonists and the Americans "retained a right of visitation" at trials. *Id.* at 2822-23, 2825.

72. *Id.* at 2823. The Chief Justice noted that public presence in the courtroom will discourage perjury, act as a check upon misconduct by participants at the trial, and assure that decisions based upon partiality, rather than the evidence, are less likely to occur. *Id.*

73. *Id.* at 2824-25.

74. *Id.* at 2825. Additionally, public access serves to educate the community concerning the operation of the courts. *Id.*

75. *Id.*

76. *Id.* at 2825-26 & n.9. In support of this proposition the Court quoted from Sheppard v. Maxwell, 384 U.S. 333 (1966) (discussed at note 20 *supra;* notes 51-53 and accompanying text *supra);* Estes v. Texas, 381 U.S. 532 (1965) (discussed at note 22 *supra;* notes 54-55 and accompanying text *supra*); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (Frankfurter, J., dissenting from denial of cert.); *In re* Oliver, 333 U.S. 257 (1948) (discussed at note 20 *supra*); Craig v. Harney, 331 U.S. 367 (1947) (discussed at notes 21-22 and accompanying text *supra*); Pennekamp v. Florida, 328 U.S. 331 (1946) (discussed at notes 20 & 26-28 and accompanying text *supra*).

77. 100 S. Ct. at 2826. *See* note 23 *supra.*

78. 100 S. Ct. at 2826-27. This finding by the Court was possible because "'[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in the enumerated guarantees." *Id.* at 2829. Examples of implicit rights, the Court found, include the rights of association, NAACP v. Alabama, 357 U.S. 449 (1958); privacy, Griswold v. Connecticut, 381 U.S. 479 (1965) and Stanley v. Georgia, 394 U.S. 557 (1969); interstate travel, United States v. Guest, 383 U.S. 745 (1966) and Shapiro v. Thompson, 394 U.S. 618 (1969); presumption of innocence, Estelle v. Williams, 425 U.S. 501, 503 (1976) and Taylor v. Kentucky, 436 U.S. 478 (1978); judgment by a standard of proof beyond a reasonable doubt, *In re* Winship, 397 U.S. 358 (1970). 100 S. Ct. at 2829 n.16.

of the first amendment [79] the Court stated that that the amendment does more than protect freedom of expression; it protects the process of communication.[80] The Chief Justice then observed that the process of free communication about the functioning of government [81] requires a degree of public access to information about governmental operations and concluded that courtrooms may not be "summarily" closed to the public.[82] Refusing to further characterize the right to attend criminal trials, the Chief Justice observed:

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," . . . or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press would be eviscerated." . . . . The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.[83]

The Court noted that the first amendment guarantee of a right to peaceably assemble is also implicated by the closure of a trial.[84] Like other places traditionally open, such as streets, sidewalks, and parks, a courtroom is a public place where people have a right to gather.[85]

After identifying the public's right to attend criminal trials,[86] and placing it within the first amendment, the opinion then stated that this

79. 100 S. Ct. at 2827. The Court stated that "[f]ree speech carries with it some freedom to listen." *Id.* The functional model of the first amendment was articulated in *First Nat'l Bank v. Bellotti*. *See* notes 38-40 and accompanying text *supra*.

80. 100 S. Ct. at 2827. The Court quoted *Bellotti* in noting that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id., quoting* First Nat'l Bank v. Bellotti, 435 U.S. at 783. *See* notes 38-40 and accompanying text *supra*.

81. 100 S. Ct. at 2826-27. The Chief Justice stated that the first and fourteenth amendments, "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.*

82. *Id.* at 2826-27. It was possible for the Court to find this prohibition because courtrooms were presumptively open to the public when the first amendment was adopted. *Id.*

83. *Id.* at 2827 (citations omitted) (footnotes omitted), *quoting* Branzburg v. Hayes, 408 U.S. at 681. *But see* Houchins v. KQED, Inc., 438 U.S. at 10 (reading *Branzburg* as implying no first amendment right of access to news sources). For a discussion of *Branzburg, see* notes 41-42 and accompanying text *supra*.

84. 100 S. Ct. at 2828.

85. *Id.*

86. *Id.* at 2829. The Court noted that, although historically civil trials have also been presumptively open, whether the public has a right to attend civil trials was not an issue in the case. *Id.* at 2829 n.17.

right is subject to limitation.[87] Without delineating when such limitation would be appropriate,[88] the Chief Justice observed that in the present case, the trial judge had made no findings concerning the nature of the threat to the defendant's right to a fair trial,[89] had given no consideration to other less drastic measures which might have reduced that threat,[90] and had not weighed the impact of the closure order against the first amendment rights of the public and press.[91] Therefore, the order was held to be improper.[92] The Court implied, however, that, were a judge to find an "overriding interest," a criminal trial could be closed, first amendment guarantees notwithstanding.[93]

Justice White, in a brief concurrence, stated that an interpretation of the sixth amendment as forbidding the exclusion of the public from criminal proceedings, a position urged by Justice Blackmun's dissent in *Gannett* in which Justice White had joined, would have made the *Richmond Newspapers* decision unnecessary.[94] Justice Stevens concurred to emphasize the importance of the Court's holding that the "acquisition of newsworthy matter" is entitled to constitutional protection.[95]

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87. *Id.* at 2830 n.18. The Court stated that its holding "does not mean that the first amendment rights of the public and representatives of the press are absolute." *Id.*

88. *Id.* The Court reserved the question of what circumstances would justify closing all or part of a trial to the public, but indicated that trial judges retain the authority to place limitations on access for the purpose of maintaining order. *Id.*

89. *Id.* at 2829.

90. *Id.* at 2830. The Court suggested that sequestration of witnesses and/or jurors might have provided sufficient protection for the defendant's right to a fair trial without infringing upon the public's right to attend the trial. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* This implication was manifest in the Court's holding that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Id.* (footnote omitted). What the necessary findings would entail was not indicated, although the Court did speak of the need to conduct a trial in a "quiet and orderly setting." *Id.* at 2830 n.18.

94. *Id.* at 2830 (White, J., concurring). *See* note 65 *supra.*

95. 100 S. Ct. at 2830 (Stevens, J., concurring). Justice Stevens considered this a "watershed case" since, in his opinion, it represented the first time that the Court "squarely held that the acquisition of newsworthy matter [as opposed to the dissemination thereof] is entitled to any constitutional protection whatsoever." *Id.* Furthermore, Justice Stevens interpreted the Court's holding to mean "that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.*

He distinguished this case from *Gannett* in two ways: 1) there were no findings made by the trial judge in *Richmond Newspapers,* as there had been in *Gannett,* to support the closure order; and 2) the issue in *Gannett* was whether the sixth amendment secured a public right of access to court proceedings while *Richmond Newspapers* presented the issue in a first amendment context. *Id.* at 2831 n.2 (Stevens, J., concurring). For a discussion of

Justice Brennan, joined by Justice Marshall, concurred in the judgment.[96] Reviewing the cases dealing with a first amendment right of access to information,[97] Justice Brennan found the issue of the existence of such a right to be unresolved, but considered the cases as providing factors to be weighed in determining if and when such a right exists.[98] He concluded, however, that a right of access is implicit in the first amendment because that amendment protects not only the act of communication between speaker and listener but also the "indispensible conditions of meaningful communication." [99]

Nevertheless, Justice Brennan noted that first amendment protection for the process of communication must be "invoked with discrimi-

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the bases used by other justices to distinguish *Gannett, see* note 69 *supra* (Chief Justice Burger); notes 96 & 107 *infra* (Justices Brennan and Stewart respectively).

96. 100 S. Ct. at 2832 (Brennan, J., concurring in the judgment). Justice Brennan distinguished *Gannett* as having considered the question of a sixth amendment right of access to pretrial proceedings while this case dealt with a first amendment claim of a right to attend trials. *Id.*

97. *Id.* at 2832-33 (Brennan, J., concurring in the judgment). Justice Brennan referred to *Gannett* (for a discussion of *Gannett, see* notes 58-66 and accompanying text *supra*); *Houchins v. KQED, Inc.* (for a discussion of *Houchins, see* notes 47-49 and accompanying text *supra*); *Saxbe v. Washington Post Co.* (for a discussion of *Saxbe, see* notes 44-46 and accompanying text *supra*); *Pell v. Procunier* (for a discussion of *Pell, see* notes 43-46 and accompanying text *supra*); *Estes v. Texas* (for a discussion of *Estes, see* notes 22 & 54-57 and accompanying text *supra*); Zemel v. Rusk, 381 U.S. 1 (1965). 100 S. Ct. at 2832-33 (Brennan, J., concurring in the judgment).

98. 100 S. Ct. at 2832-33 (Brennan, J., concurring in the judgment). Justice Brennan read the right of access cases as giving viability to the issue of first amendment protection of such rights:

> [T]he Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. . . . These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.

Id.

99. *Id.* at 2833 (Brennan, J., concurring in the judgment) (footnote omitted). Justice Brennan observed that

> [the first amendment] has a *structural* role to play in securing and fostering our republican system of self-government. . . . The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensible conditions of meaningful communication.

Id. (footnote omitted). Justice Brennan reasoned that the structural model's implicit assumption that valuable public debate must be informed indicates that the "indispensible conditions" include access to information. *Id.* For further discussion of the structural model, *see* notes 79-83 and accompanying text *supra.*

nation and temperance," [100] and a balance must be struck between the need for the information and the justification for denying access.[101] He identified two factors to be considered in striking such a balance: 1) past practice with regard to access to the type of information sought [102] and 2) the effect of access upon the process which generates the information sought.[103]

In the context of public trials, Justice Brennan found that public access to the courtroom has "been the essentially unwavering rule in ancestral England and in our own Nation" [104] and that the public has a legitimate interest in maintaining this access because of its salutory effects on the trial process.[105] Justice Brennan found that this combination of history and function creates a rebuttable presumption that trials should be open to the public.[106]

Justice Stewart also concurred in the judgment, finding that the trial judge's failure to consider the public's first amendment rights required reversal of the closure order.[107] Justice Stewart noted, however, that the first amendment right of access is not absolute, and identified several restrictions upon it.[108]

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100. 100 S. Ct. at 2834 (Brennan, J., concurring in the judgment).

101. *Id.* Justice Brennan stated that "[a]n assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." *Id.* (footnote omitted).

102. *Id.* Justice Brennan stated that the argument for a right of access is greater when access to particular information has been the tradition. *Id.* This is so "because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience." *Id.*

103. *Id.* The effects to which Justice Brennan referred include whether public access would enhance the process of generating the information sought, *see* note 105 *infra,* or whether the process would be hindered by invasion of "interests in security or confidentiality." 100 S. Ct. at 2833 (Brennan, J., concurring in the judgment). *See* note 98 *supra.*

104. 100 S. Ct. at 2836 (Brennan, J., concurring in the judgment).

105. *Id.* at 2837-39 (Brennan, J., concurring in the judgment). The effects identified by Justice Brennan include demonstrating to the public the fairness of the judicial system, maintaining public confidence, acting as a check upon possible abuse of judicial power, and aiding accurate fact finding. *Id.*

106. *Id.* at 2839 (Brennan, J., concurring in the judgment). Justice Brennan postponed a determination of the findings necessary to overcome this presumption. *Id.* Nevertheless, he did suggest that a threat to national security might justify closing portions of a trial. *Id.* at 2839 n.24 (Brennan, J., concurring in the judgment).

107. *Id.* at 2841 (Stewart, J., concurring in the judgment). Justice Stewart's principal disagreement with the opinion of the Chief Justice was the former's reading of *Gannett* as being concerned with the assertion of a sixth amendment right of access to courtrooms generally, ignoring any distinction between trials and pretrial proceedings. *Id.* at 2839-40 (Stewart, J., concurring in the judgment). Justice Stewart stated that the first amendment right of access applies to both civil and criminal trials. *Id.* at 2840 (Stewart, J., concurring in the judgment). He reserved the question of whether it also applies to a pretrial suppression hearing. *Id.*

108. *Id.* at 2840 (Stewart, J., concurring in the judgment). The restrictions identified are those imposed for the purpose of maintaining order rather

Justice Blackmun, also concurring in the judgment, adhered to the view that the public has a sixth amendment right of access to trials.[109] He agreed, however, that the first amendment also protects this right[110] but expressed concern over the inability of the Court to achieve a clear consensus concerning "the nature—and strictness—of the standard of closure the Court adopts."[111]

Justice Rehnquist dissented, stating that, by dictating rules concerning the administration of justice to all fifty states, the Supreme Court had, in his view, exceeded its capabilities.[112] This expansion of the Court's authority, he states, is "unhealthy" in that it smothers a pluralism that would otherwise exist.[113] Given these considerations, Justice Rehnquist was reluctant to term the trial judge's closure order improper given the absence of an explicit constitutional prohibition.[114]

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than secrecy. *Id.* Justice Stewart's articulation of these possible limitations was similar to that contained in the opinion of the Chief Justice. *See* notes 87 & 93 and accompanying text *supra.*

109. 100 S. Ct. at 2842 (Blackmun, J., concurring in the judgment). Justice Blackmun, author of a dissenting opinion in *Gannett,* viewed the sixth amendment as providing a right of public access to both trials and pretrial suppression hearings. *Id. See* note 65 *supra.* He considered *Richmond Newspapers* as resolving some of the confusion engendered by the *Gannett* opinion, concluding that "[t]he Court's ultimate ruling in *Gannett,* with such clarification as is provided by the opinions in this case today, apparently is now to the effect that there is no *Sixth* Amendment right on the part of the public—or the press—to an open hearing on a motion to suppress." 100 S. Ct. at 2842 (Blackmun, J., concurring in the judgment) (emphasis in the original).

110. 100 S. Ct. at 2842 (Blackmun, J., concurring in the judgment). Forced to look beyond the sixth amendment, Justice Brennan was "driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial." *Id.*

111. *Id.* Justice Blackmun pointed to the variety of language used in the separate opinions to mark the scope of the public's right of access to trials as indicating that a first amendment approach to this right is "troublesome." *Id.*

112. *Id.* at 2843 (Rehnquist, J., dissenting). Justice Rehnquist indicated that this task exceeds the abilities of the Court. *Id.* He observed:

> The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens. But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 states, is a task that no Court consisting of nine persons, however gifted, is equal to.

Id.

113. *Id.* Justice Rehnquist disapproves of such a concentration of power in the hands of nine men, all lawyers, who enjoy life tenure in their positions. *Id.* Moreover, in *First Nat'l Bank v. Bellotti,* Justice Rehnquist expressed doubt about the extent to which the first amendment is applicable to the states. *See* note 40 *supra.*

114. 100 S. Ct. at 2844 (Rehnquist, J., dissenting). Justice Rehnquist believes that no part of the Constitution may be "fairly read" as prohibiting this closure. *Id.*

On review of the *Richmond Newspapers* decision, it is submitted that the Court's reasoning leaves many questions unresolved. Following a comprehensive review of the history of public attendance at criminal trials [115] and the benefits flowing from open courtrooms,[116] Chief Justice Burger concludes that a presumption of openness "inheres in the very nature of a criminal trial under our system of justice." [117] The presumption alone, however, does not create a constitutional right of attendance for the public or press,[118] and the Court then attempts to identify a constitutional source of the right to attend trials.[119] The Chief Justice's opinion acknowledges that this precise question has never before been addressed, noting that in *Gannett* "[t]he Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing," [120] and calls attention to his concurrence in *Gannett* in which he "specifically emphasized" that *Gannett* did not involve a *trial*.[121]

Having pointed out that the slate on which he was about to write was relatively clean, the Chief Justice does not address any sixth amendment considerations.[122] Assuming the validity of the distinction between trials and pretrial hearings, it seems peculiar that the Chief Justice would have foregone the opportunity to decide this case on that basis if sufficient support could have been mustered. A review of the positions taken by the justices in *Gannett* and the present case suggests that the Court's failure to decide the issue based on the sixth amendment might be a result of Chief Justice Burger's lack of belief in his own distinction.[123] Based upon their concurring opinions in *Richmond Newspapers,* it is clear that Justices White and Blackmun would have supported such an effort.[124] Furthermore, as noted by Justice White's *Richmond Newspapers* concurrence,[125] there were four votes—Justices White, Blackmun, Brennan, and Marshall—in favor of finding a sixth amendment right of access in the pretrial context.[126] It would seem that, given their willingness to find a sixth amendment right of access to pretrial suppression hearings, the existence of such a right in the

115. *See* notes 70-71 and accompanying text *supra.*
116. *See* notes 72-74 and accompanying text *supra.*
117. 100 S. Ct. at 2825.
118. *Id.* at 2826.
119. *Id.* at 2826-29.
120. *Id.* at 2821 (emphasis in the original). *See* note 69 *supra.*
121. 100 S. Ct. at 2128, *citing* Gannett Co. v. De Pasquale, 443 U.S. at 394 (Burger, C.J., concurring).
122. 100 S. Ct. at 2814-30. *See id.* at 2830 (White, J., concurring).
123. *See* notes 124-30 and accompanying text *infra.*
124. *See* notes 94 & 109 and accompanying text *supra.*
125. 100 S. Ct. at 2830 (White, J., concurring).
126. *Id.*

context of a trial would follow *a fortiori*.[127] Thus, these four justices, together with Chief Justice Burger, constitute a potential majority of the Court which may support a sixth amendment right of access to criminal trials. Nevertheless, the Court "eschewed the Sixth Amendment route." [128] Either Chief Justice Burger, having reserved the question of the sixth amendment's applicability to a right of public access to trials, would decide that question in the negative; or Justices Brennan and Marshall accept the references to "trials" in the Court's *Gannett* opinion [129] at face value and feel that precedent now constrains them to pursue the first amendment approach.[130]

Having refused to ground its opinion on the sixth amendment, choosing instead to base a presumption of openness on the strength of a combination of past practice and salutory result [131] and rooting that presumption within the first amendment, the Court has created for itself several opportunities. The first of these is the ability to place limitations upon the newly recognized right,[132] although the precise definition of these limitations is left for another day.[133] If supported by clearly articulated findings of the trial judge, a number of interests may be sufficient to overcome the presumption of openness identified by the Court in this case, although the analysis to be used and weight to be afforded the competing considerations are by no means clear.[134]

Foremost among these would appear to be the defendant's right to a fair trial.[135] A finding that the presence of the public and press would

127. *Id.*

128. *Id.* at 2842 (Blackmun, J., concurring in the judgment).

129. Gannett Co. v. De Pasquale, 443 U.S. at 382-83, 391. *See* note 61 and accompanying text *supra*.

130. *See* 100 S. Ct. at 2832 (Brennan, J., concurring in the judgment). Justice Brennan appears to feel that *Gannett* settled sixth amendment assertions of a right of public access to trials, describing its holding as being "that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press." *Id.*

131. *See* notes 70-76 & 100-06 and accompanying text *supra*.

132. *See* notes 87, 93, 106 & 108 and accompanying text *supra*.

133. 100 S. Ct. at 2830 n.18. The Chief Justice, in declining to specify when a trial may be closed, stated: "[w]e have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public . . . ." *Id.* Justice Brennan agreed with this reservation of the question, stating: "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now . . . ." *Id.* at 2839 (Brennan, J., concurring in the judgment) (footnote omitted).

134. *Id.* at 2830 n.18.

135. *Id.* at 2840 (Stewart, J., concurring in the judgment). This was the justification offered for the closure order in this case. *Id.* at 2819. Recognizing that this contention was not without merit, Justice Stewart stated that "while there exist many alternative ways to satisfy the constitutional demands of a fair trial, those demands may also sometimes justify limitations upon the

make a fair trial impossible may overcome the presumption of public access to criminal trials.[136] Before ordering closure, however, the judge must consider other steps short of closure which may protect the defendant's rights without as significant an impact on the public's rights.[137]

Another interest that may be sufficient to overcome the presumption of public access to criminal trials is the protection of youthful witnesses, usually victims, testifying about obscene and disgusting acts.[138] It must be noted that, in finding a presumption of openness, the Court relied on the historical practice and functional benefits of open trials.[139] However, neither consideration may be applicable to such testimony.[140] It has not been the universal practice to allow the public to attend trials while youngsters testified about sex crimes, partly because such attendance may intimidate or traumatize the child.[141] Thus, limits upon public access may still retain validity in such cases.[142]

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unrestricted presence of spectators in the courtroom." *Id.* at 2840 (Stewart, J., concurring in the judgment).

136. *See* note 135 and accompanying text *supra.*

137. *See* note 90 and accompanying text *supra.* Justice Stevens pointed out the absence of a record justification for the closure order in this case. 100 S. Ct. at 2831 (Stevens, J., concurring). Justice Stewart stated that this order must be reversed because the judge gave no consideration to the rights of the public or press to be present. *Id.* at 2841 (Stewart, J., concurring in the judgment). *See* note 107 and accompanying text *supra.*

It seems difficult to imagine a circumstance where the presence of the public at a trial would pose a threat to the defendant's rights that could not be met by some remedial step short of closure, for example, sequestration of the jury. 100 S. Ct. at 2830. Justice Brennan observed that "[s]ignificantly, closing a trial lacks even the justification for barring the door to pretrial hearings: the necessity of preventing dissemination of suppressible prejudicial evidence to the public before the jury pool has become, in a practical sense, finite and subject to sequestration." *Id.* at 2839 (Brennan, J., concurring in the judgment). While a threat might be posed by the presence of demonstrably partisan or unruly spectators, or by a crowd so large as to alter the atmosphere of the court, there seems to be no doubt that a trial judge could respond to this situation through appropriate steps to limit access to the courtroom. *Id.* at 2830 n.18. Such problems seemed to be those with which the Chief Justice was principally concerned. *Id.* Justice Stewart used virtually identical language when considering possible justifications for access restrictions to trials. *Id.* at 2840 (Stewart, J., concurring in the judgment). Justice Brennan made the point that "[t]he presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum." *Id.* at 2839 n.23 (Brennan, J., concurring in the judgment). Of course, any limitations imposed would have to provide for adequate representation by the press. *Id.* at 2830 n.18. Justice Stewart also indicated the need for providing press access at all times during which the public is afforded access. *Id.* at 2830 n.3 (Stewart, J., concurring in the judgment).

138. 100 S. Ct. at 2840-41 n.5 (Stewart, J., concurring in the judgment).

139. *See* notes 75 & 102-06 and accompanying text *supra.*

140. *See* note 141 and accompanying text *infra.*

141. Gannett Co. v. De Pasquale, 443 U.S. at 388 n.19.

142. *See* note 138 and accompanying text *supra.*

Finally, national security interests were specifically identified as one possible justification for denying public access to a criminal trial.[143] In order to prove that a defendant in an espionage trial revealed a state secret it may be necessary to disclose that secret. Were revelation of the secret to imperil the nation's security, this interest would be balanced against the benefit of public access to both the fact-finding process and the public's ability to acquire information necessary for an intelligent evaluation of the judicial process.[144] Quite conceivably, the greater weight could permissibly fall upon the side of a brief limitation on public access to the courtroom. Of course, the defendant in a criminal trial has a sixth amendment right to demand a public trial, and, if he does so, the extent of the public's right of access would be a moot question.

Whether the right of the public to attend trials identified in this case applies to civil, as well as criminal, trials is left unanswered by the Court.[145] In all probability, it does. The two pillars of the Court's reasoning, history[146] and function,[147] apply equally well to both kinds of trials. However, in the civil area as well as in the criminal area, the presumption of openness could be overcome by an "overriding" interest.[148] If the civil suit were to seek legal redress for the revelation of a trade secret, for example, public access to the courtroom during testimony outlining the secret itself would be inimical to the purpose of the suit.[149]

The Court's holding in *Gannett* that the public may not gain access to a pretrial suppression hearing through the sixth amendment, and its holding in *Richmond Newspapers* that the first amendment assures a degree of access to criminal trials, leaves open the question of whether the first amendment provides a public right of access to sup-

143. 100 S. Ct. at 2839 n.4 (Brennan, J., concurring in the judgment).

144. *See* notes 93, 98 & 101-03 and accompanying text *supra*.

145. 100 S. Ct. at 2830 n.17. *But see id.* at 2840 (Stewart, J., concurring in the judgment) (first amendment access rights apply equally to civil and criminal trials).

146. *Id.* at 2830 n.17. The Chief Justice stated that "[w]e note that historically both civil and criminal trials have been presumptively open." *Id.*

147. *See* notes 72-74 and accompanying text *supra*. Indicating that these benefits are equally relevant in the context of a civil trial, Justice Brennan stated that "mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and the defendant." 100 S. Ct. at 2838 (Brennan, J., concurring in the judgment).

148. 100 S. Ct. at 2830. Arguably, the public interest in attending criminal trials is greater than in attending civil trials. *Id.* at 2827. If an "overriding" interest justifies closing the former, certainly any presumption of openness concerning the latter could also be overcome.

149. *See id.* at 2841 n.5 (Stewart, J., concurring in the judgment). Justice Stewart suggests that maintenance of trade secrets may justify the closing of portions of civil trials. *Id.*

pression hearings.[150] The principal reason for excluding the public from such a proceeding would be to prevent potential jurors from reading or hearing press accounts concerning the nature of evidence suppressed.[151] This concern could be satisfied, however, either by a change of venue or by a delay of the trial until publicity had abated, remedies that preserve the interests of the public. The most compelling situation for admitting the public would appear to arise when the outcome of the hearing could be determinative of whether there will be any further litigation.[152]

For the first time, the Court has recognized constitutional protection for the "acquisition of newsworthy matter." [153] In determining whether this protection would extend to material other than a judicial proceeding, courts will undoubtedly look to the information sought and the interest invaded.[154] Historic practice with respect to this information will be a consideration.[155] Thus, the reasoning of this decision is unlikely to open doors traditionally closed to the public but could prevent the closing of doors traditionally left open. Additionally, the effect of public access to information upon the process of generating that information would have to be considered,[156] and before granting access to particular information a court would consider the interest invaded.[157] It would determine whether public access would destroy confidences, interfere with security,[158] or disrupt the orderly conduct of administra-

150. *Id.* at 2839-40 (Stewart, J., concurring in the judgment). Historical practice with respect to public access to pretrial hearings is not as clear as it is with respect to trials. Gannett Co. v. De Pasquale, 443 U.S. at 387-91.

151. *See* note 137 *supra.*

152. Gannett Co. v. De Pasquale, 443 U.S. at 434-35 (Blackmun, J., dissenting). A pretrial suppression hearing may be the only judicial proceeding of significance during a criminal prosecution, and may provide the only forum for scrutiny of the conduct of law enforcement personnel. *Id.*

153. 100 S. Ct. at 2830 (Stevens, J., concurring).

154. *See* note 101 and accompanying text *supra.*

155. *See* notes 70, 71, 82 & 102 and accompanying text *supra.*

156. 100 S. Ct. at 2834 (Brennan, J., concurring in the judgment). Justice Brennan reasoned that a party seeking access to particular information will not succeed merely by arguing that public possession of the information will improve the quality of public discussion. *Id.* Justice Brennan stated that "[a]nalysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Id.* Admitting the public to a trial improves that trial. *See* notes 72-74 & 105 and accompanying text *supra.*

157. *See* note 101 and accompanying text *supra.*

158. *See* note 98 *supra. See also* Gannett Co. v. De Pasquale, 443 U.S. at 398 (Powell, J., concurring). Justice Powell, while recognizing a first amendment right of access to pretrial suppression hearings, also recognized that "[t]he right of access to courtroom proceedings, of course, is not absolute. It is limited both by . . . needs of government . . . to preserve the confidentiality of sensitive information and the identity of informants." *Id.*

tive functions.[159] Finally, articulated justifications for denying access to information and a balancing of first amendment rights of access by the denying authority would be accorded weight during judicial review.[160] In light of the foregoing, it would appear that *Richmond Newspapers* is *not* the equivalent of a "freedom of information act" or a judicial "sunshine law," but it will serve to prevent government entities from arbitrarily denying access to information which has long been available to the public and press.[161]

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159. *See* notes 43-49 and accompanying text *supra*. This was a major factor in the jail access cases. *Id.*

160. 100 S. Ct. at 2830. Findings are required to close a trial. *Id.* at 2841 (Brennan, J., concurring in the judgment).

161. *But see* Goodale, *Gannett is Burned by Richmond's First Amendment 'Sunshine Act'*, Nat'l L.J., Sept. 29, 1980, at 24.